

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 15, 2006

GREG HARRIS V. STATE OF TENNESSEE

**Appeal from the Criminal Court for Sullivan County
No. C51,635 R. Jerry Beck, Judge**

No. E2006-00406-CCA-R3-PC - Filed December 12, 2006

The petitioner, Gregg Harris, was convicted by a Sullivan County jury of criminal conspiracy to sell or deliver more than 300 grams of cocaine, a Class A felony; possession of more than 300 grams of cocaine for resale within 1,000 feet of a school, a Class A felony; and two counts of possession of drug paraphernalia, Class A misdemeanors. He received an effective sentence of fifty years. Petitioner filed a petition for post-conviction relief. The trial court dismissed the petition without the appointment of counsel and without a hearing. In this appeal, he challenges the trial court's dismissal of his petition. Following our review, we affirm the dismissal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment
of the Criminal Court Affirmed**

J. S. STEVE DANIEL, SR.J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and ALAN E. GLENN, J., joined.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; and H. Greeley Wells, Jr., District Attorney General, for the Respondent, State of Tennessee.

Greg Harris, Petitioner, *pro se*.

OPINION

Proceeding *pro se*, petitioner was convicted of criminal conspiracy to sell or deliver more than 300 grams of cocaine and possession of more than 300 grams of cocaine for resale within 1,000 feet of a school, both Class A felonies, and two counts of possession of drug paraphernalia, a Class A misdemeanor. As a Range I offender he received twenty-five year sentences on the felony convictions, to run consecutively and concurrent 11 month 29 day sentences for each misdemeanor conviction for an effective sentence of fifty years.

Counsel was appointed to pursue the appeal. On appeal, a panel of this Court affirmed the convictions but reversed the trial court's imposition of consecutive sentences. Under this sentence modification, petitioner was sentenced to twenty-four years on each felony, to run concurrently. The felony sentences were ordered to run concurrently with the misdemeanor sentences. State v. Harris, No. E2003-02834-CCA-R3-CD, 2005 WL 419082 (Tenn. Crim. App. filed Feb. 23, 2005 at Knoxville).

On January 18, 2006, the petitioner timely filed a pro se petition for post-conviction relief. As grounds for relief, petitioner claimed (1) the prosecutor failed to disclose certain exculpatory evidence relating to witness Charles B. Miller; (2) his convictions violate double jeopardy protections; (3) appellate counsel was ineffective in failing to designate certain portions of the record on appeal including the jury verdict forms; (4) the trial court's rulings on the motion *in limine* regarding a school zone map; and (5) because the arrest warrant was based on false evidence, the seized evidence should have been excluded.

The trial court dismissed the petition by order dated February 9, 2006. In its order, the court included a detailed explanation and analysis of each post-conviction claim and the trial court's basis for dismissal. The trial court concluded that the petition "will be dismissed on the basis [that] the court cannot identify a colorable claim. The matter is dismissed without hearing or appointment of counsel."

In this appeal, petitioner claims his petition set out colorable claims, and therefore, the post-conviction court erred in dismissing his petition without a hearing and without the appointment of counsel. We disagree.

Tennessee Code Annotated section 40-30-103 (2003) provides that post-conviction relief . . . "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Section 40-30-106 (2003) provides the following procedure to be followed by trial courts:

(a) The trial judge to whom the case is assigned shall, within thirty (30) days of the filing of the original petition, or a petition amended in accordance with subsection (d), examine it together with all the files, records, transcripts, and correspondence relating to the judgment under attack, and enter an order in accordance with the provisions of this section or § 40-30-107.

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(d) The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full

disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

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(f) Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

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(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

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(i) If the petition is not dismissed pursuant to this rule, the court shall enter a preliminary order as provided in § 40-30-107.

Tenn. Code Ann. § 40-30-106 (2003).

In determining whether to grant an evidentiary hearing, the trial court first considers the petition to determine whether the petitioner asserts a colorable claim. A colorable claim

is defined in Supreme Court Rule 28 § 2(h) as “a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.” Burnett v. State 92 S.W.3d 403, 406 (Tenn. 2002). If the petitioner fails to allege facts or if the facts alleged, taken as true, fail to show that the petitioner is entitled to relief, i.e., fails to state a colorable claim, the petition shall be dismissed.

In the present case, the post-conviction court ruled that the post-conviction petition failed to make out a colorable claim and included issues that had been previously determined. Issues relating to suppression and sufficiency of the evidence were addressed on direct appeal.

On direct appeal, this court found that both issues were without merit. State v. Greg Harris, No. E2003-02834-CCA-R3-CD, 2005 WL 419082, at *4-10. Accordingly, these issues have been previously determined and are without merit.

The petitioner next claimed the prosecutor withheld information about a prior conviction of trial witness and co-defendant, Charles B. Miller. Petitioner contends such actions violated the order of discovery and the mandates of Brady v. Maryland, 373 U.S. 83 (1963). Petitioner insisted that without this information he was unable to effectively impeach Mr. Miller.

In State v. Baker, 623 S.W.2d 132, 133 (Tenn. Crim. App. 1981), this Court held that neither the Tennessee Rules of Criminal Procedure nor Tennessee case law require the prosecutor to reveal to the defendant the criminal record of state witnesses in pretrial discovery. Later in State v. Workman, 667 S.W.2d 44, 51 (Tenn. 1984), our supreme court held “the state has no duty, either under the Tennessee Rules of Criminal Procedure or by decisional law in this state to provide such information [the arrest history of state witnesses] to the defendant.” Based on this long standing authority, the post-conviction court properly concluded this claim was without merit.

In his next claim, petitioner maintained that the two felony convictions violate the prohibition against double jeopardy. He specifically claims that based on the facts adduced at trial, he could **either** have been convicted of criminal conspiracy to sell or deliver more than 300 grams of cocaine **or** possession of more than 300 grams of cocaine with intent to sell or deliver within 1,000 feet of a school, but not both. (emphasis added).

First, we note that essentially the same issue was addressed in the direct appeal, in the section of the opinion entitled, “Verdict Unanimity.” Greg Harris, No. E2003-02834-CCA-R3-CD, 2005 WL 419082, at *10-13. A panel of this court found the claim to be without merit in the direct appeal.

Citing Blockburger v. U.S., 284 U.S. 299 (1932), the petitioner reasserts the same claim in his post-conviction petition. In Blockburger, the United States Supreme Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is

whether each provision requires proof of an additional fact which the other does not.” Id. at 304.

In the present case, the charge of cocaine possession required the state to prove that the defendant: (1) knowingly possessed cocaine within 1,000 feet of real property that comprised a private or public school, (2) with intent to resell, and (3) the amount of the cocaine possessed exceeded 300 grams. Tenn. Code Ann. § 39-17-417(j)(5) (2010). The offense of conspiracy is committed when two or more persons, each having the culpable mental state required for the offense which is the object of conspiracy and each acting to promote or facilitate commission of the offense, agree that one or more of them will engage in conduct constituting that offense. Tenn. Code Ann. § 39-12-103(a) (2001). A conviction of criminal conspiracy to commit an offense also requires the state to prove that the defendant or another with whom the defendant conspired performed an overt act in furtherance of the conspiracy. Tenn. Code Ann. § 39-12-103(d) (2001). An examination of these elements illustrates that each offense requires proof of different elements. Therefore, petitioner’s claim is without merit. The trial court properly denied relief on this post-conviction issue.

Next, petitioner claims he received the ineffective assistance of appellate counsel. In support of his claim, petitioner cites to appellate counsel’s failure to “file with the appellate court record, the verdict forms” and “the trial court’s ruling on the motion *in limine* (which was filed by the defendant (petitioner) on December 3, 2002, which sought exclusion of the school zone chart). On direct appeal, petitioner claimed the chart should have been excluded because he did not receive a copy of it until the day before trial. A panel of this court found no merit to this argument. Harris, No. E2003-02834-CCA-R3-CD, 2005 WL 419082 at *13-14.

Notwithstanding this court’s prior consideration of the school zone chart/map issue, petitioner now claims the omission of the chart on appeal “affected the criminal court of appeals ruling on [the] claim.” However, he failed to state a factual basis as to how the exclusion of the school chart/map or the verdict forms prejudiced him in appellate review. Tenn. Code Ann. § 40-30-106(d) (2003) requires the petitioner to allege facts which demonstrate that he or she is entitled to relief. If such facts are not presented, the petition shall be dismissed. Id. Here, these bald allegations, without a supporting factual basis, fail to meet the statutory requirements. This claim is without merit.

Our review of this record leads us to conclude that the post-conviction court properly applied Tenn. Code Ann. § 40-30-106 in finding that petitioner failed to allege facts establishing a “colorable claim” and/or that the issues had been previously determined. Finding no error in the post-conviction court’s order denying an evidentiary hearing and refusing to appoint counsel, we affirm the post-conviction court’s dismissal of the petition.

J. S. DANIEL, SENIOR JUDGE